

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

GARY L. KIMBLE,

Plaintiff,

v.

Case No. 06-C-807

JUDY SMITH,

Defendant.

DECISION AND ORDER

On August 1, 2006, the Court denied Gary Kimble's ("Kimble") petition to proceed *in forma pauperis* because, contrary to his claim, the Court determined that Kimble could in fact pay the \$5.00 filing fee. The Court, therefore, pursuant to 28 U.S.C. § 1915(e)(2)(A), dismissed Kimble's case. Subsequently, Kimble filed a motion for reconsideration, accompanied by a payment of \$5.00, in which he asked the Court to reopen his case.

The Court will affirm its August 1, 2006 Order and Decision. Section 1915(e)(2)(A) provides that "the court *shall* dismiss the case *at any time* if the court determines that the allegation of poverty is untrue." (emphasis added.) "This requirement does not mandate that the district court dismiss [a petitioner's] claim if it finds that certain assertions in his affidavit are untrue; instead, it requires the district court to dismiss the claim if it finds that Lee is not sufficiently poor to qualify for *in forma pauperis* status given the facts that are true." *Lee v.*

McDonald's Corp., 231 F.3d 456, 459 (8th Cir. 2000). Kimble's dismissal "must be based on whether his *allegation of poverty* is true, and not whether he misstated his assets in his affidavit." *Id.* (emphasis in the original)

In his petition for *in forma pauperis*, Kimble alleged, under penalty of perjury, that he was "unable to pay the fees and/or costs of these proceedings." However, this Court made a factual finding that deemed Kimble's allegation untrue. The Court determined that, in fact, Kimble could pay the \$5.00 filing fee. When the Court makes such a finding, it does not have discretion to keep the case open so that the petitioner can later pay his fee. Rather, the text of section 1915(e)(2)(A) mandates that the Court "shall dismiss the case at any time if the court determines that the allegation of poverty is untrue."

Kimble's motion for reconsideration is denied. If he wishes to re-file his habeas petition, accompanied with his \$5.00 filing fee, he is free to do so.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

Kimble's Motion for Reconsideration (Docket No. 5) is **DENIED**. The clerk is directed to return the \$5.00 to Kimble.

Dated at Milwaukee, Wisconsin this 7th day of December, 2006.

BY THE COURT

s/ Rudolph T. Randa

Hon. Rudolph T. Randa
Chief Judge